In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

Respondents do not accept petitioner's statement of the questions presented for review, and submit they are more accurately stated as follows:

1. Was it appropriate for the Court of Appeals to hold that the speed of the tanker SANTA MARIA was in excess of the "moderate speed" required by Article 16(a) of the Inland Rules (33 U.S.C. § 192) under circumstances where:

(a) The SANTA MARIA was a large vessel proceeding up a narrow river channel toward a fog bank,

(b) The SANTA MARIA knew that a downcoming tug and its barge in tow were concealed in the fog bank, but could not see the tug and tow or its change of course because of the fog,

(c) The SANTA MARIA maintained a speed of 7-8 knots (half speed), at which speed she could not be stopped before reaching the point where she first visibly saw the tug and tow emerge from the fog on a right angle course, but instead was still going 3 to 7 knots at the moment of collision, and

(d) The SANTA MARIA could have reduced to substantially slower speed (slow speed) and still maintained good steerage way?

2. Should the rule that in mutual fault collision cases the damages are divided equally, which has been the established law of the United States for over a hundred years, be changed in favor of proportional fault, and if so, should this be done by judicial decision or by legislation?

STATEMENT OF THE CASE

Petitioner's "statement of the case" should not be accepted. A fair statement is set forth in the Court of Appeals opinion (A. 27-29).[1]

The essential facts are that SANTA MARIA was a large tanker, 550 feet long, 11,291 gross tons, fully loaded with 17,000 tons of petroleum products. She was proceeding upstream, in darkness at night, in a narrow channel of the Columbia River. She maintained a speed of 7 to 8 knots[2] while approaching a fog bank that concealed the downcoming tug and barge.[3] The SANTA MARIA knew of the presence of the tug and barge, but could not see their position or change of course because of the fog.

The tug crew sighted the mast lights of the SANTA MARIA looming through the fog, at less than 1,000 feet distance. Fearing imminent collision, the tug executed a sharp U-turn to its left and tried to run away from the tanker (R. 161, 187, Ex. 25, R. 117-19). The tug actually completed the U-turn, and was making headway up river, going in the same direction as the SANTA MARIA, at the time of the colli-

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[1] The Court of Appeals decision is now reported 451 F.2d 1369, and is also set forth in Appendix to the Petition for Certiorari. References herein will be to the Appendix, as A. 26-37.

[2] One knot (nautical mile) = 6,000 ft.; 1 knot speed = 100 ft. per minute; 8 knot speed = 800 ft. per minute.

[3] The tug was 110 feet long, twin screw, 1500 HP; the barge was 275 feet long, on a 250 foot towline. They were proceeding at 7 knots, and slowed to 3½ knots on first hearing SANTA MARIA'S fog signal (R. 155, 171, 219).

sion. The barge followed behind the tug on its tow line, and was headed diagonally up river when struck by SANTA MARIA (Ex. 25, R. 117-19).

The SANTA MARIA sighted the tug emerging from the fog bank at about 900 feet distance, at which moment the tug was in the middle of its U-turn and proceeding across and at right angles to the course of the tanker.[4] SANTA MARIA immediately went full astern, but in one minute collided with the barge (Ex. 25, R. 117-19, 80, 111, 188, 192, 224, and see diagram p. 5 of Br. in Opp. to Pet. for Cert.).

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[4] Petitioner's "Statement of the Case," (Pet. Br. 5) while admitting that SANTA MARIA's pilot lost visual sight of the tug in the fog (A. 28) states that her third mate saw the tug through binoculars and saw her commence the turn. This is contrary to the district court's express findings of fact.

The evidence from SANTA MARIA's witnesses was conflicting and contradictory. Her lookout on the bow testified "it was pretty foggy . . . it was thick fog" (Ex. 28, R. 150, pp. 6-7). The third mate (still a junior officer at age 58) was less than clear in his testimony and admitted he was blowing fog signals (R. 114-115). Her attorney stated that the tug "disappeared into a localized fog bank" (R. 9).

The tug's witnesses testified they were in a thick fog, and although they heard SANTA MARIA's fog signal, and were looking intently, they were unable to see SANTA MARIA's lights until they loomed up almost dead ahead within 250-300 yards (R. 155, 158-60, 176, 182, 205, 216, 222, 223).

This conflicting testimony was resolved by the district court's express fact findings that the tug and barge proceded "towards, into and through a fog bank" (A. 23); that

> "Prior to the collision the SS SANTA MARIA lost visual contact with the tug though she herself was out of the fog." (A. 21);

and then, when SANTA MARIA was "on the edge of the fog bank, she sighted the tug SAN JACINTO headed across her bow" (A. 21). These findings are conclusive against Union Oil on that issue of fact.

At her "half-speed" of 7-8 knots, SANTA MARIA was unable to stop before reaching the point where the tug and barge emerged from the fog. Indeed she was still going 3-7 knots at the moment of impact (A. 29).

SANTA MARIA could have reduced to a more moderate "slow speed" before reaching the fog bank without affecting her steering capability (A. 33, R. Ex. 26, R. 133, pp. 9, 17) but failed to do so. For this failure to reduce speed, and resulting inability to stop before collision, the Court of Appeals held SANTA MARIA at fault for exceeding the "moderate speed" requirement of Article 16(a). It therefore modified (not "reversed") the lower court's decision, and held both vessels at fault (A. 36).

SUMMARY OF ARGUMENT

1. The Court of Appeals properly held the SANTA MARIA at fault for immoderate speed in violation of Article 16(a), 33 U.S.C. § 192. SANTA MARIA was proceeding in a narrow river channel, approaching a fog bank which she knew concealed the downcoming tug and barge. At her admitted speed of 7-8 knots (half-speed) she was unable to stop within the requirements of the Rule of Sight, which requires that a vessel not exceed the speed at which she can come to a stop within her share of the visibility in time to avoid collision with a vessel which she sees emerge from the fog, provided the other vessel's speed is also

moderate. Indeed, SANTA MARIA traversed the entire distance of visibility and was still going 3-7 knots at the time of impact.

The Rule of Sight (often called the half-distance of visibility rule) was first pronounced in decisions of this court, is generally applied as the "traditional rule" which "everybody knows," and is also the law of England. The rule has been established by the courts as a standard of "moderate speed" in frequented waters, and is a viable rule of safety to prevent collisions. The rule takes into account the "existing circumstances and conditions," as required by Article 16(a). In the present case all the circumstances and conditions, including the prior sighting of the tug on radar, required cautious speed and compliance with the rule. SANTA MARIA's immoderate speed cannot be excused by necessity to maintain steerageway, for she could have reduced to slow speed without impairing her steering capability. The rule was properly applied under the circumstances of this case.

2. The rule that in mutual fault collision cases the damages are divided equally has been the settled law of the United States for more than 100 years. It was approved by unanimous decision of this Court in 1963. It was the law of England before England adopted the Brussels Convention. It is a good rule, promotes settlements, and the American Bar Association has recommended against change.

The Brussels Convention of 1910 has been adopted

by all other leading maritime nations. It governs various matters arising from collisions, including obligations of shipowners to cargo. The Convention limits cargo's recovery to that part of its damages which is in proportion to the fault of the non-carrying vessel, and there is no recovery over against the carrying vessel. For this reason there is broad support for the Convention, although it has failed to gain Senate ratification. But support for the Convention in its entirety should not be confused with support for piecemeal adoption of only the rule dividing damages in proportion to fault. The question whether damages should be divided equally, or in proportion to fault, cannot be considered in a vacuum, but only in relation to other principles of law. Piecemeal adoption of the proportional fault rule alone would produce results frustrating the intent of Congress expressed in COGSA and the Harter Act. For these reasons the matter should be left to legislative determination.

I

SANTA MARIA'S EXCESSIVE SPEED

The Rule of Sight

"Fog is the ancient terror of mariners. Particularly in waters bearing heavy traffic, such as areas adjacent to harbors or well-traveled ocean lanes, the presence of fog vastly increases the chances of collision." *Gilmore and Black, The Law of Admiralty* (1957) 415.

Accordingly, Article 16(a) of the Inland Rules[5] provides:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions." 33 U.S.C. § 192.

The Court of Appeals held SANTA MARIA's 7-8 knot speed "immoderate," applying the traditional "Rule of Sight" to the facts of the case.

The Rule of Sight was first established by decisions of this Court. Generally speaking, the rule is this: — to comply with the "moderate speed" requirement of Article 16(a), a vessel proceeding in or near a fog bank, in waters where she is likely to encounter another vessel, must reduce to such speed as will enable her, by immediately reversing her engines upon first sighting another vessel, to come to a stop before colliding with the other vessel. Thus if each vessel complies, each will be able to stop at or before the point of impact.

The "Rule of Sight" was first stated by this Court in *The Nacoochee*, 137 U.S. 330, 34 L. Ed. 687 1890). The steamer NACOOCHEE was held in fault for going at half speed, 6-7 knots, in fog on the open ocean where she knew she might encounter other vessels. This Court said:

> "She was bound, therefore, . . . to maintain only such rate of speed as would enable her to come to a standstill, by reversing her engines at

[5] The International Rule is substantially the same. 33 U.S.C. § 1077 (a).

full speed, before she should collide with a vessel which she should see through the fog." 137 U.S. at p. 339, 34 L. Ed. at p. 690.

The rule was next stated in substantially the same language in *The Umbria*:

> "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." *The Umbria*, 166 U.S. 404, 417, 41 L. Ed. 1053, 1061.[6]

The same rule was again stated in *The Chattahoochee*, 173 U.S. 540, 548, 43 L. Ed. 801, 805 (1899).

It is clear that the rule laid down by this Court in these early cases requires each vessel to proceed only at such speed that she can be stopped within *her share* of the distance of visibility. The requirement is that they be able to stop "*in time to avoid a collision.*" Thus two approaching vessels, suddenly coming in sight of each other in the fog, must each be able to stop within one half of the distance at which they first become visible, in order to avoid collision.

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[6] Petitioner seizes on the words "provided such approaching vessel is herself going at the moderate speed required by law" to suggest that because the district court found the tug's speed of 7 knots, reduced to 3½, was immoderate, SANTA MARIA is relieved of the duty of moderate speed (Pet. Br. 18). In other words, if both vessels are going at excessive speed, neither is at fault. This absurd suggestion answers itself. The language of course refers to avoidance of collision, not to the duty.

This is well stated in Griffin's leading American treatise on collision:

> "In *The Nacoochee*, and in *The Umbria*, . . . the Supreme Court said, not that the vessel need be able merely to stop within the visible distance, but that she must stop *'before she should collide with a vessel which she should see through the fog,'* 'provided that such approaching vessel is herself going at the moderate speed required by law.'
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> "The Supreme Court meant that each vessel must be able to stop before she reached the meeting point, — in other words, to restrict each vessel to her share of the visible distance. No other rule would accomplish the result." *Griffin, The American Law of Collision*, 1949, at pp. 294, 295.

As clearly pointed out in the Court of Appeals opinion, SANTA MARIA did not comply with the Rule of Sight. Not only was she unable to stop within one-half the distance to the point at which she saw the tug and barge emerge from the fog bank; indeed since the course of the tug and barge were at right angles to the course of the SANTA MARIA when first sighted, and then diagonally upriver away from the SANTA MARIA, it is clear that SANTA MARIA's momentum carried her substantially the *entire distance* of visibility. And even at the moment of collision she was not stopped but was still proceeding at 3-7 knots speed. This is virtually conceded by Petitioner (Pet. Br. 5, 22).

The Rule of Sight Is Consistent with "Regard to the Existing Circumstances and Conditions"

Petitioner's basic argument is that "moderate speed" is a relative term, and that the Court-fashioned rule of sight is inconsistent with "regard to existing circumstances and conditions," and unreasonably limits the discretion of the navigator.

Respondents agree that "moderate speed" is a relative term, and depends on regard to the existing circumstances. But the Rule of Sight is not inconsistent with this concept. Indeed the courts have often said in one breath that moderate speed is a relative term dependent on the circumstances, and then have gone on to pronounce and apply the Rule of Sight.

Thus, in *The Chattahoochee*, 173 U.S. 540, 43 L. Ed. 801 (1899), holding 7 mile speed in fog excessive, this Court said:

> "No absolute rule can be extracted from these cases. So much depends upon the density of fog and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances."

immediately following which the Court stated the rule to be:

> "It has been said by this Court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed re-

quired by law." 173 U.S. at p. 548, 43 L. Ed. at p. 805.

Respondents do not contend that the Rule of Sight applies at all times in the open ocean where no other vessel is likely to be met. It does apply in rivers or harbors and places where other vessels should be anticipated.

The Rule of Sight obviously takes account of the particular circumstances such as positions of the vessels, weather, density of the fog, size and maneuverability of the vessels, etc. These are the very factors that enter into the ability of the vessel to stop within her share of the visibility. If visibility is a mile, obviously a vessel is permitted much greater speed than if visibility is only a hundred yards. If a strong current or headwind would help stop the vessel, that again may be considered. A twinscrew vessel may stop more quickly by extra power astern. A fully loaded vessel may have to proceed more slowly than a light vessel, due to the fact that her momentum will carry her further. What is required by the Rule of Sight is that the vessel proceed at such moderate speed that she can stop within her share of the visibility, in time to avoid collision after sighting the other vessel. Of course, all the circumstances and conditions enter into her ability to stop.

Petitioner's brief sets forth a list of the existing circumstances and conditions to be considered in determining moderate speed, and states that the Rule of Sight ignores them. (Pet. Br. 12-13.) We accept the

list, and show that nearly every one calls for extra caution under the facts of the present case:

(a) *The density of the fog and the condition of the weather for hearing fog signals;*

Here the fog bank that concealed the tug and barge were so dense that SANTA MARIA did not see them until they emerged on a right angle course some 900 feet distant. It was in the dark of night. (A. 27, 30).

(b) *Whether the vessel is in narrow waters or on the broad ocean;*

Here she was navigating in the narrow channel of the Columbia River (A. 27).

(c) *Whether on fishing grounds or in frequented or unfrequented waters;*

Much frequented waters—one of the main arteries of commerce in the Pacific Northwest.

(d) *The possibility or probability of meeting other vessels;*

Very probable — in fact SANTA MARIA knew she was meeting the tug and barge, although she could not see them.

(e) *The readiness with which a vessel (if laden or in ballast) is able to maneuver;*

SANTA MARIA was fully loaded with 17,000 tons of petroleum products, and did not, and apparently could not, maneuver to avoid collision. (Unlike the small twin screw tug which could and did maneuver quickly to turn and run.)

(f) *The quickness with which she can be brought to a standstill with the reserve of steam available for that purpose;*

SANTA MARIA, because of her size, speed and momentum, could not be brought to a standstill even in the 900 feet, but was still going 3-7 knots at the time of impact.

(g) *Her position with respect to heavy tideways, strong currents or other dangers;*

This was not a factor. There was no appreciable tide or current (Ex. 9, R. 132).

Thus every circumstance and condition but one called for extreme caution, and compliance with the Rule of Sight, at least to the point consistent with steerageway. Under all the circumstances, SANTA MARIA's unnecessary speed was immoderate.

Moderate Speed as Defined by the Courts—The Rule of Sight

Petitioner's brief makes the astonishing statement that "The Ninth Circuit Court of Appeals is the only court to adhere to the half distance rule" (Pet. Br. 15). That is simply not true. As shown above, the rule originated in this Court's decisions in *The Nacoochee*, supra, *The Umbria*, supra, and *The Chattahoochee*, supra. See also *Griffin on Collision*, (1949) 294-95.

The learned authors Gilmore and Black in *Law of Admiralty* state:

> "A rule of thumb, often applied, is that a speed is moderate if, given the conditions of visi-

bility that prevail, the vessel can come to a dead stop in one-half the distance between herself and another vessel when first sighted." citing this Court's decision in *The Umbria*, supra. *Gilmore and Black, Admiralty*, 416.

Contrary to the assertions in Petitioner's brief, the law of England likewise applies the Rule of Sight.

". . . their lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place." *The Great Eastern*, Brown and Lushington Adm. 287 (cited with approval in *The Umbria*, 166 U.S. 417, 41 L. Ed. 1061.

And in *The Kincora* v. *The Oceanic*, a collision in fog in the Irish Sea, the large steamer Oceanic was held at fault for 6 1/3 knot speed. The House of Lords said:

"She was going at a speed which rendered it impossible to stop within the limit of observation." *The Oceanic*, 9 Aspinall's M.C. (N.S.) 378, 380 (H.L. 1903). See also *La Boyteaux, Rules of the Road at Sea*, 82.

In the Second Circuit, the Rule of Sight is so commonly applied that Learned Hand refers to it as a rule that "everybody knows":

"Although Article 16, 33 U.S.C.A. § 192, only requires a vessel in a fog to 'go at a moderate speed' *as everybody knows*, the courts have imposed a gloss upon this that 'moderate speed is

that at which, if the other vessel also does her duty, the vessel will be able to stop her way before they collide' " (emphasis supplied) *Anglo Saxon Petroleum Co.* v. *United States*, 222 F.2d 75, 77, rehearing 224 F.2d 86 (2 Cir. 1955).

The opinion on rehearing makes it clear the vessel was required to stop in her *share* of the visibility—less than 300 feet in visibility of approximately 500 feet, and further says of the requirement of moderate speed: *"the command is imperative,"* and is not excused by necessity to maintain steerageway, 224 F.2d 86, 87.

Many other cases in the Second Circuit adhere to the Rule of Sight or an even stricter rule.[7]

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[7] *Skibs A/S Siljestad* v. *S/S Mathew Luckenbach*, 215 F. Supp. 667 (S.D. N.Y. 1963) aff'd 324 F2d 563; *Villain & Fassio E Compagnia* v. *The Tank Steamer E. W. Sinclair*, 207 F. Supp. 700 (S.D. N.Y. 1962), aff'd 313 F.2d 722; *Afran Transport Co.* v. *The Bergechief*, 170 F. Supp. 893, 899; 274 F.2d 469, 473 (2nd Cir. 1960); *Polarus S.S. Co.* v. *T/S Sandefjord*, 236 F.2d 270 (2 Cir. 1956); *The William H. Taylor*, 278 F. 717 (2 Cir. 1922); *The Manchioneal*, 243 F. 801 (2 Cir. 1917); *The Bayonne*, 213 F. 216 (2 Cir. 1914); *Holland-America Line* v. *M/V Johs. Stove*, 286 F. Supp. 69 (S.D. N.Y. 1968); *Oil Transfer Corp.* v. *Westchester Ferry Corp.*, 173 F. Supp. 637 (S.D. N.Y. 1958).

In *Polarus*, as in many cases, the court stated that "moderate speed" is a relative term, depending on the circumstances, and then went on to say that the purpose of the statute is spelled out in the "sight rule." Under the particular facts, the Polarusoil was able to stop dead in the water before the collision, and so was exonerated. 236 F.2d 270, 271-72.

Skibs A/S Siljestad, supra, suggests an even stricter rule. After stating "some courts have applied the Rule of Sight, viz., to be able to stop within the vessel's share of the visibility," the opinion proceeds, "perhaps, too, the decisional

Likewise the Third Circuit: *The Bohemian Club*, 134 F.2d 1000, 1002-3 (1943), and the Fourth Circuit: *City of Norfolk*, 266 F. 641, cert. den. 253 U.S. 491, 64 L. Ed. 1028 (1920).

Also the Fifth Circuit: *O/Y Finlayson-Forssa* v. *Pan Atlantic S.S. Corp.*, 259 F.2d 11 (5 Cir. 1958), cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959). In that case, Judge John R. Brown, an experienced admiralty practitioner, said:

> "Without a doubt the circumstances called for the application of the traditional rule of sight by which the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility. *The Tug Percheron*, 5 Cir., 246 F.2d 135, 1957 A.M.C. 1941; *The Nacoochee*, 137 U.S. 330, 339, 34 L. Ed. 687, 690; *The Umbria*, 166 U.S. 404, 417, 41 L. Ed. 1053, 1060; *Griffin on Collision*, pp. 288-296.
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> ". . . the Antinuous had to demonstrate that . . . she could stop before she traversed one-half the distance she could see. *A. H. Bull SS Co.* v. *United*

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law in this circuit is even stricter than either the bare steerageway rule or the rule of sight," 215 F. Supp. 667, 679.

In *Afran Transport Co., supra*, The Bergechief was condemned even for maintaining bare steerageway. 170 F. Supp. 893, 899.

In *Oil Transfer Corp., supra*, Judge Learned Hand states "It is quite true that the *generally accepted rule* is that a vessel may travel in a fog at a speed that will allow her to stop within the distance of the existing visibility if she meets another vessel who can also stop within that distance. That would of course mean half the distance of the visibility if the meeting vessel was moving at the same speed, . . ." 173 F. Supp. at 639).

States, 2 Cir., 34 F.2d 614, 1929 A.M.C. 1175; *The Lillian Anne-Pennsylvania*, 2 Cir., 1934 A.M.C. 569, cert. den.; *Chesapeake & Delaware Steamboat Company* v. *The Tug Pennsylvania*, 293 U.S. 575, 55 S. Ct. 86, 79 L. Ed. 673, 1934 A.M.C. 1410; *The Goldshell-White Plains*. 2 Cir., 224 F.2d 86, 1955 A.M.C. 1438; *Marsden's Collisions at Sea*, 10th Ed. 1953, pp. 479-480." 259 F.2d 20-21, cert. den. 361 U.S. 882, 4 L. Ed. 2d 119 (1959).

A recent administrative decision from the Coast Guard, which presumably has some expertise in matters of navigation, states: "The old and established rule that in conditions such as existed here, the speed should be reduced to that in which the ship's forward motion could be stopped within half the distance of visibility still is appropriate." *Dewey Soriano—License*, 1969 A.M.C. 2141, 2158.

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Discretion of the Navigator Must Be Exercised Within the Standards of the Rule of Sight

Petitioner asks that the Rule of Sight be scrapped, leaving it solely to the discretion of the navigator to determine what is moderate speed under the circumstances. Nothing could be more conducive to collisions.

The Rule of Sight is a rule of safety. Speed is the greatest cause of collision, and the rule places a limitation on speed. In effect, the rule sets a minimum standard. The vessel's speed must be moderate, and when she is navigating in restricted waters where it

is probable she will meet other vessels, her speed must be reduced at least to the point where she can stop within her share of visibility. And this still depends upon all of the factors and circumstances that control the ability of the vessel to stop within her share of the visibility. No complicated calculations are required. For a navigator familiar with the weather and the stopping capability of his vessel, as he should be, it should be no more difficult to obey the rule of visibility than for a person driving on a highway to drive at such speed that he can stop in case the car ahead should make a sudden stop.

"Discretion" should be no license to violate the rule. As said by the First Circuit Court of Appeals, in *The Sagamore*, 247 F. 743 (1917):

> "The discretion of the navigator in the matter of speed in a fog must be exercised not wholly as a matter of individual judgment or of individual views as to what is moderate speed, but also with due regard to the interpretation of the term 'moderate speed' by the maritime courts and to the general standards of good seamanship established by those courts in applying the term 'moderate speed.'" 247 F. 743, 749. See also *Griffin on Collision* (1949) 299; *La Boyteaux, Rules of the Road at Sea*, pp. 80-81.

In this connection, the words of Learned Hand, quoted in the opinion below (A. 36) are worth repeating:

> "The fact that the rule (Rule of Sight) is more honored in the breach than in the observance merely means that people are usually willing to

take chances rather than submit to the galling necessity of poking about in a fog; and, although the usual measure of the care demanded is that commonly used in the calling, that is not the inevitable standard. Common prudence is not always adequate prudence; the courts may and at times do condemn practices that are current in the business." *Anglo-Saxon Petroleum Co.* v. *United States*, 222 F.2d 75, 78 (2d Cir. 1955).

Radar

Petitioner suggests that SANTA MARIA's radar sighting of the tug is a circumstance which relieves it from the Rule of Sight (Pet. Br. 13-14). This is contrary to the Radar Annex, the decisional law, and good sense.

It is common knowledge that radar, while a valuable aid, is no safeguard against collision.[8] Undue reliance on radar often brings about "radar-assisted" collisions that might not have occurred without radar. See *Moscow, Collision Course* (*The Andrea Doria—Stockholm Collision*), Putnam, N.Y. 1959; *Polarus S.S. Co.* v. *T. S. Sandefjord*, 236 F.2d 270, 271 (2 Cir. 1956); *Ove Skou Rederi A/S* v. *Nippon Yusen Kaisha*, 1971 A.M.C. 470, 472 (Supreme Ct. of Canada); *Skibs A/S Siljestad* v. *S. S. Mathew Luckenbach*, 215 F. Supp. 667, 679-80 (S.D. N.Y. 1963).

Petitioner's citation of the Radar Annex (Pet. Br. 13) fails to include the most significant portion:

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[8] Radar tells only of the presence of another vessel, but unless plotting is done (and SANTA MARIA did no plotting) it does not indicate course or speed or changes of course of the other vessel.

> "Radar indications of one or more vessels in the vicinity may mean that 'moderate speed' *should be slower* than a mariner without radar might consider moderate in the circumstances" (emphasis supplied) 33 U.S.C.A. § 1094(2) (1963).

Since Congress had "moderate speed" under consideration when adopting the Radar Annex in 1963, and the courts have for many years enforced the Rule of Sight as a standard of moderate speed, the above language implies legislative approval of the rule.

The courts have uniformly held that radar-equipped vessels, which have sighted the other vessel on radar, are bound by the rule of visibility. *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11 (5th Cir. 1958); *Norscott Shipping Co.* v. *Steamship President Harrison*, 308 F. Supp. 1100 (E. D. Pa. 1970); *Holland-America Line* v. *Motor Vessel Johs. Stove*, 286 F. Supp. 69 (S.D. N.Y. 1968); *United States* v. *Motor Ship Hoyanger*, 265 F. Supp. 730 (W.D. Wash. 1967); *Skibs A/S Siljestad* v. *Steamship Mathew Luckenbach*, 215 F. Supp. 667 (S.D. N.Y. 1963); *Weyerhaeuser Steamship Co.* v. *United States*, 174 F. Supp. 663 (N.D. Cal. 1959). All of these decisions invoke the half-distance rule. *Wood, et al* v. *United States*, 125 F. Supp. 42 (S.D. N.Y. 1954). See also *Meadows, Radar Annex and Rule 16*, 5 Willamette L.J. (1969) 399, 403 and many cases cited in note 12.

Steerageway

While all courts recognize the Rule of Sight as the general rule, some have qualified it by saying a vessel must reduce to the slowest speed consistent with maintaining steerageway.

Most decisions have rejected the steerageway excuse. *The Pennsylvania*, 86 U.S. 125, 134, 22 L. Ed. 148, 151 (1874); *Anglo-Saxon Petroleum Co.* v. *U. S.* (rehearing), 224 F.2d 86 (2 Cir. 1955); *Afran Transport Co.* v. *The Bergechief*, 170 F. Supp. 893, 899 (S.D. N.Y. 1959); *Holland-America Line* v. *M. V. Johs. Stove*, 286 F. Supp. 69, 72 (S.D. N.Y. 1968). *United States* v. *M. S. Hoyanger*, 265 F. Supp. 730, 734 (W.D. Wash. 1967).

Other decisions, however, have indicated that it is permissible to maintain the minimum speed requisite to maintain steerageway. ". . . it is not unreasonable to require that she reduce her speed to the lowest point consistent with a good steerageway, which the court finds in this case to be three miles an hour." *The Martello*, 153 U.S. 64, 70, 38 L. Ed. 637, 640 (1894); See also *The Sagamore*, 247 F. 743, 748 (1st Cir. 1917); *Hess Shipping Corp.* v. *S.S. Charles Lykes*, 417 F.2d 346 (5 Cir. 1969), reh. en banc 424 F.2d 633, cert. den. 400 U.S. 853, reh. den. 400 U.S. 931.*

* The *Hess* case recognizes the Rule of Sight, but by 7 to 7 divided opinion on rehearing, allowed a speed as moderate where any further reduction would have seriously impaired control of the vessel. Judge John R. Brown vigorously dissented. 417 F.2d 351.

In any event, the steerageway excuse is not available to SANTA MARIA under the facts of the case. She was proceeding at half speed. She could, and should, have reduced to slow speed without impairing her steering.[10] As the Court of Appeals said, "But we have no evidence that the SANTA MARIA could not be safely navigated at less than seven to eight knots." (A. 33).

II

DIVISION OF DAMAGES—EQUAL OR PROPORTIONAL

It has been the established admiralty rule in the United States, for more than 100 years, that in mutual fault collision cases the damages are shared equally.[11]

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[10] SANTA MARIA's helmsman, with 22 years experience, testified his vessel 'steered good', and steered just as well at slow speed as at half or full speed:

"Q. Is it more difficult to hold an exact course when you are going at slow speed?

A. I don't find it so, no. If you give it enough wheel, she will hold her course real good.

* * * * *

Q. Now, does it make any difference whether you are going full speed, half speed or slow speed and fully loaded?

A. Not if you give it enough wheel it doesn't make and difference...." (Ex. 26, R. 133, p. 17).

The pilot testified, 'You can't slow a loaded ship, any ship, tanker or otherwise, from a full ahead to a slow bell without losing your steering. You have to reduce it slowly. But after you once get the speed off, they handle very good.' (A. 33, note 5).

[11] *Schooner Catherine* v. *Dickinson*, 58 U.S. (17 How.) 170, 15 L. Ed. 233 (1855); *Phoenix Ins. Co.* v. *The Atlas*, 93 U.S. 302, 319, 23 L. Ed. 863, 868 (1876); *Halycon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 284, 96 L. Ed. 318, 319 (1952); *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 603, 10 L. Ed. 2d 1, 6 (1963).

Accordingly the Court of Appeals, having found SANTA MARIA at fault for immoderate speed, ordered that the judgment of the district court "be modified to hold both vessels at fault, and the damages divided" (A. 36).

Petitioner asks that this Court, by judicial decision, scrap the equal division rule and adopt in its place a rule dividing damages in proportion to the degree of fault.

Seeking sympathy for its position, petitioner suggests that the tug's fault was more flagrant and shocking than that of SANTA MARIA, and that SANTA MARIA's fault may not even have contributed to the collision.

The principal fault of the tug was her U-turn, which was an in extremis maneuver to escape and run away from the tanker after sighting its lights ahead in the fog at close range. The tug's speed was less than that of SANTA MARIA and she was a far more maneuverable vessel.

SANTA MARIA's violation of the moderate speed requirement of Article 16 was a most serious fault, and no mere technical violation.[12]

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[12] Petitioner's reliance upon the district court's statement that fault of the SANTA MARIA was a "possible technical violation" (Pet. Br. 24) is misplaced. The district court was there referring to the tug's contention, pressed vigorously at the trial, that SANTA MARIA had violated the *second part of Article 16* requiring a vessel to *stop engines* on hearing a fog signal ahead. This is evident from the context, and the cases cited. That contention was dropped on the appeal. It has nothing to do with the rule of sight under the "moderate speed" requirement of the first part of Article 16, which was wholly overlooked or ignored by the trial court.

Considering that speed in fog is one of the greatest causes of collision, that SANTA MARIA knew the tug and barge were approaching but concealed by the fog, and that, in the words of Learned Hand the "command is imperative" for moderate speed, it is indeed doubtful whether the fault of the SANTA MARIA was any less than that of the tug.

It is obvious from any analysis of the facts that SANTA MARIA's immoderate 7-8 knot speed was a contributing cause of the collision. Had she been able to stop within her share of the visibility, or even within the entire distance of visibility, there would have been no collision.

In any event, it is well settled that SANTA MARIA's violation of the moderate speed requirement of Article 16 casts upon her the burden of the rule of *The Pennsylvania*, to prove not only that her speed *did not* contribute, but that it *could not have* contributed to the collision.[13] SANTA MARIA cannot possibly meet this burden.

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[13] *The Pennsylvania*, 86 U.S. 125, 22 L. Ed. 148 (1874); *Yang-Tsze Ins. Ass'n* v. *Furness, Withy & Co.*, 215 F. 859 (2d Cir. 1914), cert. dismissed 242 U.S. 430, 37 S. Ct. 141 (1917); *Eastern S.S. Co.* v. *International Harvester Co. of N. J.*, 189 F.2d 472, 476, 1951; *Boyer* v. *The Merry Queen*, 202 F.2d 575, 1953 A.M.C. 482 (3d Cir. 1953); *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11 (5 Cir. 1958); *The Silver Palm*, 94 F.2d 754 (9 Cir. 1938); See also Gilmore & Black, Law of Admiralty, 404-405.

"Where a vessel violates this statute (Article 16) by proceeding through fog at an immoderate speed, her only chance to extricate herself from liability resulting from her collision with another vessel is not to show that the other vessel was guilty of a more flagrant fault but rather to show that such statutory fault not only did not cause, but could not possibly have caused the collision in question." *Norscott Shipping Co.* v. *Steamship President Harrison*, 308 F. Supp. 1100, 1105 (E.D. P.A. 1970).

Divided Damages vs. Proportional Fault

In 1952 this Court refered to the United States rule of equal division of damages as "established admiralty doctrine."

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases. . . ." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 284, 96 L. Ed. 318, 319 (1952).[14]

Again, in 1963, in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 603, 10 L. Ed. 1, 6, a unanimous court approved the divided damages rule as follows:

> "There is involved here, instead, a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault. *The Catharine* v. *Dickinson*, U.S. 17 How. 170, 177, 15 L. Ed. 233, 235; *The North Star (Reynolds* v. *Vanderbilt)*, 106 US 17, 21, 27 L. Ed. 91, 93, 1 S. Ct. 41. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 284, 96 L. Ed. 318, 319, 72 S. Ct. 277."

The law of England also adhered to the equal di-

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[14] *Halcyon* was followed as authority for the Per Curiam decision May 15, 1972 in *Atlantic Coast Line R.R. Co.* v. *Erie Lakawanna R.R. Co.*, No. 71-107, — U.S. —.

vision of damages rule until it was changed by legislation through adoption of the Brussels Convention of 1910.[15]

In 1962 a bill (S. 2313) to provide for proportional fault in collision cases was before the Senate. In the face of objections by interested groups, it was indefinitely postponed by unanimous consent.[16]

The American Bar Association is on record as opposed to changing the present rule of divided damages:

> "Be it Resolved, by this Association that as the present maritime law of the United States relative to division of damages in collision cases has operated satisfactorily for a long number of years, no change in such law should be approved by this Association." 1928, 17 Cornell L.Q. 348.

Petitioner has misconstrued support for adoption of the Brussels Convention of 1910 (discussed infra), as support for change in the divided damages rule. While it is true there is considerable support for the Brussels Convention in toto, there has been no pressure by steamship companies, marine insurance companies, or shipping interests, seeking to change the divided damages rule. On the contrary, we believe American marine insurance companies (whom we agree are the interested parties in most collision

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[15] *Hay* v. *Leneve*, 2 Shaw's Reports, 395; *Marsden's Collisions at Sea*, 6th Ed. 1910, pp. 123, 124. See also 17 Cornell L.Q. 343.

[16] Congressional Record 87th Cong. 2d Session, Vol. 108, part 16 p. 21249.

cases)[17] prefer the present 50-50 rule as one that clearly promotes settlements.

In most collision cases, upon its being apparent that both vessels are at fault, settlements are quickly reached with great savings in the expense and delays of prolonged litigation. Two vessel owners, or their underwriters, can readily agree that both vessels were at fault. But they can seldom agree which vessel was more at fault;—that can be as difficult as the parties to a divorce case arguing which was more at fault.

With respect to the added burden that would be imposed on the courts by a rule of proportional fault, note should be taken of the difference in practice between England and the United States. Most, if not all, collision cases in England are litigated in special admiralty courts, — the Admiralty Division of the High Court of Justice. The judges are assisted by the elder brethren,[18] nautical experts who are usually retired shipmasters, with whom the judges may consult as to the assessment of degrees of fault. With such assistance, the task of apportioning fault in a collision case may be somewhat easier for an English court than for our overworked American judges.

Brussels Convention of 1910

It is quite true that all leading maritime nations of the world, except the United States, have adopted the Brussels Collision Convention of 1910.

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[17] Pet. Br. 33.

[18] 13 Cornell L.Q. 548.

The Brussels Convention does far more than provide for proportional, rather than equal, division of damages in mutual fault collisions.[19] It also governs liabilities of the vessel owners for damages to cargo. Article 4, See Pet. Br. 40.

By Article 6, all legal presumptions of fault in collision cases are abolished.

The Brussels Convention was submitted to the United States Senate in 1937. Extensive hearings were held, but it was never ratified. After 10 years, in 1947, it was withdrawn by the President.[20]

One of the most important provisions of the Brussels Convention is that which affects the rights of cargo. In large ship collision cases there is often extensive loss and damage to cargo. This is particularly true when a vessel is sunk.

Under the Carriage of Goods by Sea Act (1936) of the United States, and similar laws of other maritime nations, the owner of a vessel on which cargo is carried is not responsible for damage to that cargo caused by fault or negligence of the master or crew in the navigation of the vessel. 46 U.S.C.A. § 1304(2)(a). This has long been the legislative policy of the United States. The Harter Act contains substantially the same provision. 46 U.S.C. § 192. Therefore, in a

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[19] The full text of the Convention, together with history of adherences, is set forth in *Bendict on Admiralty*, 7th Ed. Vol. 6, 38-42.

[20] See *Benedict on Admiralty*, 7th Ed. Vol. 6, p. 38; also Senate Report 1603, 87th Congress, 2d Session.

collision case cargo cannot recover against the carrying vessel.

However, under United States law, cargo can recover in full against the other "non-carrying" vessel if it is in part to blame. The non-carrying vessel is liable for 100% of the cargo damage, even though its share of the blame may be small. The non-carrying vessel is entitled to include its liability for cargo damages in its claim against the carrying vessel. And under the American law of equal division of damages in mutual fault collisions, the non-carrying vessel recovers back from the carrying vessel one-half of the damage to cargo on the carrying vessel. *The Chattahoochee*; 173 U.S. 540, 43 L. Ed. 801 (1899); *United States of America* v. *Atlantic Mutual Insurance Co. et al*, 343 U.S. 236, 96 L. Ed. 907 (1952). Thus, while the carrying vessel is exempt, under COGSA or the Harter Act, from a direct liability for damage to its cargo, it is subject to liability for 50% of such damage through application of the equal division of damages rule. For a full discussion of these principles, see *Gilmore and Black, Admiralty*, 152 et seq.

This is completely changed by Brussels Convention of 1910. Cargo is still precluded from recovery against its carrying vessel under the provisions of COGSA or the Harter Act. But cargo can recover against the non-carrying vessel only in proportion to that vessel's fault. Thus if the non-carrying vessel's share of the blame is only one-third, cargo can only recover one-third of its damages. And since the amount of the non-carrying vessel's liability is lim-

ited to its proportion of fault, no part of this cargo damage is charged back against the carrying vessel. Under Brussels Convention the carrying vessel has no liability, direct or indirect, for loss or damage to its cargo.

It is for this reason that American shipowners enthusiastically support adoption of Brussels Convention. And likewise the United States Government, which through the Maritime Commission, is one of the world's largest shipowners. See 64 Yale L. J. 882, 890.

It is this kind of support for Brussels Convention in its entirety that petitioner has misconstrued as support for changing the divided damages rule alone (Pet. Br. 31-33).

To adopt piecemeal the isolated provision for division of damages between the shipowners on the basis of proportional fault, without adopting the rest of the Brussels Convention, would produce results contrary to the intent of Congress and which we believe shipowners and the Maritime Commission would most strongly oppose.

Thus, suppose a collision in which the fault of the cargo carrying vessel is 90% and the non-carrying vessel 10%. Under settled United States law, cargo would recover 100% of its damages against the non-carrying vessel. But then, under a rule of proportional fault, the non-carrying vessel would recover 90% of these cargo damages back from the carrying vessel.

Such a result, going far beyond *The Chattahoo-*

chee, would frustrate the intent of Congress, expressed in the Harter Act and COGSA, to relieve the carrying vessel from liability for damage to its cargo caused by its negligent navigation.[21]

One of the chief reasons for support of the Brussels Convention is to achieve uniformity with other maritime nations. But this requires adoption of the Convention in its entirety. As can be seen from the example given, the result of piecemeal adoption of proportional fault would, in respect to liability for cargo damage, push United States law even further away from uniformity with that of other nations.

Consider also the retroactive results of the Court changing the rule by judicial decision. We agree with petitioners that shipowners do not have collisions in reliance upon the law of equal division of damages rather than proportional fault. However, millions of tons of cargo have been shipped, and premiums for cargo insurance, and P&I and collision insurance for the vessels have been paid in reliance on the law as it stands.

For these reasons, the question of divided damages versus proportional fault cannot be considered in a vacuum. Any change should be accomplished either by legislation, or by ratification of the Brussels Convention, so that all related aspects of maritime law may be taken into account.[22] If shipowners, insur-

[21] The absurdity of this result is that the carrying vessel, if 90% at fault, would bear 90% of the damages to its own cargo, but if 100% at fault, would have no liability for damage to its cargo.

ance companies, and cargo owners, are really united in a desire for a change in the rules, this can be accomplished in Congress.

For these reasons we suggest that the words of this Court in *Halcyon, supra*, and again in *U. S.* v. *Atlantic Mut. Ins. Co., supra*, are most appropriate to the present problem:

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await Congressional action. . . . A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the *Halcyon Line* is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-286, 96 L. Ed. 318, 320-321 (1952).
>
> "Here, once more, 'we think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests' of the varied groups who would be affected. . . ." *United States* v. *Atlantic Mut. Ins. Co.*, 343 U.S. 236, 242, 96 L. Ed. 907, 914 (1952).

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[22] Other principles of collision law that should be taken into account in any change of the rule as to division of damages, are the major-minor fault rule of the *Victory and the Plymothian*, 168 U.S. 410, 423, 42 L. Ed. 519, 528 (1897). See *Griffin on Collision* § 224; and the presumption under the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 136, 22 L. Ed. 148, 151 (1874), that any statutory fault is presumed to have been a contributing cause of the collision, which would be abolished by Article 6 of the Brussels Convention.

CONCLUSION

1. For the reasons stated, SANTA MARIA's 7-8 knot speed, approaching a fog bank in a narrow channel where she knew the tug was approaching, at which speed she not only could not stop, but was still going 3 to 7 knots at the time of collision, and which speed was not needed in order to maintain steerageway, was clearly immoderate and contributed to the collision.

2. The United States rule of equal division of damages in mutual fault collision cases, approved by a unanimous court in *U. S.* v. *Weyerhaeuser* in 1963, should not be changed; but if it is to be changed, this should not be done piecemeal, but only by legislation where other related rights and principles may be considered.

The well-reasoned decision of the Court of Appeals should be affirmed.

Respectfully submitted,

ERSKINE B. WOOD
1505 Standard Plaza
Portland, Oregon 97204
Counsel for Respondents

June 8, 1972

SUPPLEMENTARY/REPLY BRIEF FOR THE PETITIONER

In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH E. ROBERTS
12th Floor Standard Plaza
Portland, Oregon 97204
Counsel for Petitioner

GREGORY W. BYRNE
SOUTHER, SPAULDING, KINSEY,
WILLIAMSON & SCHWABE
Of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-72

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SUPPLEMENTARY/REPLY BRIEF FOR THE PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I

Since submisison of the Brief for Petitioner it has come to petitioner's attention that an international conference will be convened in October, 1972 to consider revision of the International Regulations for Preventing Collisions at Sea, including Article 16, the speed-in-fog rule. The convening body, the Inter-Governmental Maritime Consultative Organization (IMCO), an agency of the United Nations, has directed its Maritime Safety Committee to prepare a draft

convention to be used as a working paper at the conference. See Department of Transportation, U. S. Coast Guard, 29 Proceedings of the Maritime Safety Council 70 (Apr. 1972). Petitioner has obtained a copy of this draft (IMCO, MSC XXV/3(b)/1, 10 Feb. 1972) and believes that its provisions relating to speed in reduced visibility should be considered by the court as reflecting the latest authoritative thinking on the subject. (A copy of the draft has been made available to Respondent.) We believe that the proposed regulations make it unmistakably clear that the half-distance rule is not sanctioned by international maritime authorities as a rule of law.

Under the proposed convention, Article 16 would be replaced by Rules 25 and 26:

> Rule 25 — All vessels
>
> (a) Every vessel shall proceed at a safe speed adapted to the existing circumstances and reduced visibility conditions. A power-driven vessel shall have her engines ready for immediate manoeuvre.
>
> (b) Except where it has been determined that a risk of collision does not exist, a power-driven vessel hearing, apparently forward of her beam, the fog signal of another vessel shall immediately, so far as the circumstances of the case admit, reduce her speed to bare steerageway and, if necessary, take all her way off and then navigate with caution until danger of collision is over.
>
> Rule 26 — Vessels with operational radar
>
> (a) Any vessel which detects by radar the

presence of another vessel, prior to hearing her fog signal, and has determined that a close quarters situation is developing and/or risk of collision exists, shall, if the circumstances of the case admit and as early as practicable, avoid such a situation by alteration of course and/or speed or by stopping or reversing her means of propulsion:

(i) if course is altered to avoid a vessel forward of the beam an alteration of course to port shall, so far as possible, be avoided, unless the other vessel is being overtaken;

(ii) if course is altered to avoid a vessel abeam or abaft the beam an alteration of course towards the direction of the other vessel shall, so far as possible, be avoided.

(b) If a close quarters situation involving risk of collision cannot be avoided the vessel shall immediately, so far as the circumstances of the case admit, reduce her speed to bare steerageway and if necessary take all her way off and then navigate with caution until risk of collision is over.

It is obvious that these rules eschew a rigid, mechanical approach such as the half-distance rule, and are instead keyed to the sound judgment of the captain. The distinction between vessels with operational radar and those without is not made by the half-distance rule. The "safe speed" standard in Rule 25 is defined by Rule 5 (b):

The term 'safe speed' means a speed at which the vessel can take proper and effective action at any time to avoid collision and can be stopped

within a distance appropriate in the prevailing circumstances and conditions.

Rule 7 details the "circumstances and conditions" which *shall* be taken into account:

Rule 7 — Safe speed

Every vessel shall at all times proceed at a safe speed. In determining safe speed the following factors shall be taken into account:

(a) For all vessels:

(i) the state of the visibility;

(ii) the prevailing state of wind, sea and current;

(iii) the traffic density including concentrations of fishing vessels or any other vessels;

(iv) the proximity of navigational hazards;

(v) the manoeuvrability with special reference to stopping distance and turning ability in the prevailing conditions.

(b) For vessels with operational radar:

(i) the characteristics, efficiency and limitations of the radar;

(ii) the proper use of radar to assess risk of collision;

(iii) the effect of the state of the sea and weather and other sources of interference on radar detection;

(iv) the possibility that small ves-

sels, ice and other floating objects may not be detected by radar at an adequate range;

(v) that radar indications of one or more vessels in the vicinity, in conditions of restricted visibility, may mean that 'safe speed' should be slower than a mariner without radar might consider safe in the circumstances;

(vi) any constraints imposed by the radar range scale used.

Rule 26 operates only when the captain "has determined that a close quarters situation is developing and/or risk of collision exists. . . ." Even then, precautionary action is directed "if the circumstances of the case admit. . . ." Finally, the prescribed action is not a slowing to half-speed or any other speed but an "alteration of course and/or speed," presumably including even an increase in speed.

Petitioner believes that these proposals thoroughly repudiate rigid standards such as the half-distance rule and support the comprehensive and objective approach directed by Congress under Article 16. If the proposed rules were applied in the present case they would vindicate the judgment and conduct of the Santa Maria's pilot.

II

Respondent raises three objections to the comparative fault rule: (1) the mutual fault rule promotes settlements; (2) the comparative fault rule would

frustrate the intent of Congress, expressed in the Harter Act and COGSA, to relieve the carrying vessel from liability for cargo damage; and (3) any change in the rule should be made by Congress so that "all related aspects of maritime law" would be considered. None of these contentions has merit.

(1) The comparative fault rule would actually be a greater inducement to settle cases than the mutual fault rule. Under mutual fault vessels are encouraged to settle on a 50-50 basis only when relative fault is either roughly equal or impossible to determine. Since the comparative fault rule would also dictate a 50-50 division in these situations, its effect on settlements, to that extent, is no different. Where there is a clear disparity of fault, however, or fault on one side as in the present case, the less culpable (or innocent) party is inclined to take its chances on exoneration (as petitioner has done) rather than divide damages, particularly in view of the *City of New York* rule. Under comparative fault the parties (more accurately, their insurers) would be induced to negotiate a *pro rata* settlement.

(2) Petitioner urges adoption of the rule stated in the first paragraph of Article 4 of the Brussels convention (Br. for Petitioner at 40), which is a discrete provision of the convention applying only to apportionment of damages and having no effect on cargo. This rule would no more run counter to the purpose of the Harter Act and COGSA than the present mutual fault rule which allows 50% of the cargo

loss to be borne by the carrying vessel despite the immunity granted it by the Acts. Since Congress has not expressed its disapproval of this situation it is unreasonable to suppose that it would now do so simply because carrying vessels would be exposed to more than 50% liability. To the contrary, in cases where the carrying vessel is less than 50% at fault the comparative fault rule would be more in line with congressional intent than the mutual fault rule, since the carrying vessel's liability would be less than 50%.

(3) Respondent contends that congressional action is preferable to court action "so that all related aspects of maritime law may be taken into account." (Br. for Respondent at 32). The two "aspects" expressly referred to by respondent are rules adopted by this Court, namely, the major-minor fault (*City of New York*) rule and the *Pennsylvania* rule. *Id.* at 32 n. 22. It should be obvious that the comparative fault rule simply would overrule the former, which has fallen into disrepute anyway, and have no effect on the latter.

The only other aspect alluded to by respondent is the preference of the maritime industry for one rule or the other. Petitioner has shown that no segment of the industry is opposed to comparative fault, while some are openly in favor of it. Respondent merely surmises that some segments of the industry *might* oppose the rule, without offering any evidence to support this claim.

It is important to observe that the only virtue of

mutual fault asserted by respondent is its supposed role as a catalyst of settlements. As this assertion is untenable, the mutual fault rule is left wholly unsupported by principle.

Respectfully submitted,

KENNETH E. ROBERTS
12th Floor Standard Plaza
Portland, Oregon 97204
Counsel for Petitioner

GREGORY W. BYRNE
SOUTHER, SPAULDING, KINSEY,
WILLIAMSON & SCHWABE
Of Counsel